

**FAIR EMPLOYMENT & HOUSING COMMISSION**

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## MINUTES 481st COMMISSION MEETING

January 27, 2010  
Hiram Johnson State Building  
455 Golden Gate Avenue, Tenth Floor D.I.R. Conference Room  
San Francisco, California

***PRESENT:***

Chairman George Woolverton, Vice-Chair Patricia Perez, Commissioners Stuart Leviton, and Linda Ng; Commission staff Ann Noel and Cynthia Jones; Commission volunteer attorney Cara Panebianco; Department of Fair Employment and Housing (DFEH) Special Investigations Unit Administrator Selena Wong; Deputy Attorney General Nancy Beninati and members of the public: Susan Skamser, ADA Coordinator, Contra Costa County; Karla Davis, California Teachers' Association; Claudia Center, Esq., and Rachael Langston, San Francisco Legal Aid Society - Employment Law Center; and Noah D. Lebowitz, Esq., Duckworth, Peters, Lebowitz, LLP.

***OPEN SESSION***

Chairman Woolverton unofficially opened the meeting at 10:18 a.m. with Commissioners Patti Perez and Linda Ng present. Lacking a quorum, Chairman Woolverton explained to the public that the Commission could take no official action and would take open session items for discussion only and which did not require a vote. Because of weather problems at SFO Airport, both Commissioner Carothers' and Commissioner Leviton's plane flights had been cancelled.

**EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT**

ELAS Noel reported on the following items:

- 1. 2009-10 and 2010-2011 Budget.** As part of the Governor's order, the Commission will reduce its payroll for the next fiscal year by 5%. This will eliminate a current .2PY ALJ position but not otherwise affect the Commission's payroll.
- 2. Case Adjudication.** For the calendar year 2009, the Department filed 72 accusations with the Commission, down from 100 in 2008. In the same period of time, the Commission calendared 57 cases for three day evidentiary hearings. Of those 57 cases, Commission ALJs completed 13 evidentiary hearings, convened 44 case management conferences, and conducted seven settlement conferences (all cases settled).

ELAS Noel thanked Commissioners Perez, Carothers and Leviton for serving as volunteer mediators in several settlements. In every case, the Commissioners settled their cases.

3. **FEHC Statistics.** ELAS Noel and the Commission discussed the Commission's decisions for the past five years, noting the type of case, whether it was precedential, and whether the decision found liability or was dismissed. In these decisions, ELAS Noel noted, the win/loss ratio for DFEH was 69/31%.

#### 4. Personnel

ELAS Noel introduced the Commission's new administrative law judge, Joan Herrington, who will begin working with the Commission on February 1, 2010. Noel noted that Ms. Herrington is a very experienced lawyer with extensive FEHA litigation experience. The Commission welcomed Ms. Herrington, who expressed her pleasure at accepting the job and eagerness to begin working for the Commission. Noel stated that, in addition to a hearing caseload, Ms. Herrington will be assigned principal responsibility for the disability regulations.

ELAS Noel also introduced Cara Panebianco, an attorney who has volunteered her services with the Commission since October 2009. On behalf of the Commission, Noel thanked Panebianco for her services, stating that Panebianco has been invaluable in completing several assignments for the meeting.

#### 5. Training, Outreach and Public Speaking

ELAS Noel reported on the following training, outreach and public speaking:

- Both Noel and Vice Chair Perez participated and spoke at the Labor and Employment section's annual conference in October 2009.
  - On January 30, 2010, ELAS Noel will speak on pregnancy discrimination at the Rutter Guide's-California Judges' Association annual employment conference. Commissioners Perez, Carothers and Leviton will attend.
  - ELAS Noel and Phyllis Cheng wrote an article which summarized major developments in FEHA fair housing law in the last 50 years, published in the December 2009 State Bar *Real Property Journal*.
  - The Commission and the DFEH have developed a proposal to write a California practice guide on fair housing and public accommodations law and are in negotiations with CEB and the Rutter Guide to publish it. Susan Saylor, DFEH Associate Chief Counsel, wrote the initial outline for the fair housing section of the guide and a Commission extern working under Noel's supervision, USF law student Katon Dalton, drafted the Unruh Act section. Susan Saylor will take responsibility for the overall project, with a number of practitioners drafted to contribute portions of the guide.
6. **Office Move.** ELAS Noel reported that the Commission will be moving this summer to new offices in downtown Oakland at the Elihu Harris state building there, in space adjoining the DFEH's Oakland offices. We will save significantly on rent with this move and welcome the

opportunity to be next door to the DFEH's Oakland office. Chairman Woolverton asked ELAS Noel to write a letter to him giving details of the move and to keep him apprised of the move's progress.

7. **Commissioner Training.** ELAS Noel reminded the Commissioners to keep abreast of their ethics and AB 1825 training.

### **ATTORNEY GENERAL'S REPORT**

Deputy Attorney General (DAG) Nancy Beninati reported on the work of the Civil Rights Enforcement Section (CRES) of the Attorney General's (AG) Office.

- The Attorney General has obtained a permanent injunction against gangs in the Los Angeles area that were harassing students near Fremont High School.
- Deputy Attorney General Michael Newman is working on a lawsuit against a landlord who owns several apartment complexes and who has stated a preference to rent to Asians only and who advertises his rental properties solely in Asian language papers.
- On November 20, 2009, the Attorney General issued a press release about a group of individuals perpetuating a Ponzi scheme directed at more than 40 African American churches nationwide, including California churches. The scam involves convincing church congregations to lease "kiosks" from third party leasing companies. These kiosks can download sermons as well as print out coupons for congregation members and ostensibly can generate advertising income for the churches. In reality, the kiosk-leasing plan was a Ponzi scheme for the scam perpetrators to take money from the congregations, leaving them with unpaid bills to the third party leasing companies. Other state Attorneys General are suing the scam leaders.

### **REGULATIONS**

ELAS Noel reported on the current status of the Commission's regulatory projects in the areas of pregnancy, disability and housing. Commissioners are working with staff on each regulatory project.

**Pregnancy Regulations:** The Commission's revamped fiscal impact statement is with the Department of Finance awaiting review and approval. Once the Department of Finance signs off on this statement, the Commission can begin rulemaking.

**Disability Regulations:** The Commission reviewed its disability regulations and welcomed members of the public to comment on its draft regulations, asking each person to submit in writing any suggested changes after the meeting. The following members of the public offered their comments about the Commission's draft regulations. All references to the regulations are from the Commission's January 11, 2010 draft disability regulations, before the Commission for their review and approval.

**Claudia Center**, Esq., Staff Attorney with the Legal Aid Society – Employment Law Center (LAS-ELC), San Francisco gave the following comments:

- In general, she is pleased with the Commission’s draft disability regulations, which she thinks are “getting there.”
- **Pg. 7, § 7293.6(d)(9)(B):** There is no basis under FEHA for a **temporary disability exception**.
- **Pg. 7, § 7293.6(d)(9)(C): “Obesity”** should not be carved out as a exception, as people are obese for a variety of reasons, many of which would be considered disabilities. It’s up to the employee’s medical provider to establish the reason for the individual’s obesity.
- **Pg. 11, § 7293.6(j)(1)(A) & (1)(B):** the comparison should not be between the disabled person’s ability to achieve a major life activity and the “general population,” but rather a “relevant population.” Noel noted that the draft disability language follows the EEOC’s revamped ADA regs. Center stated that LAS-ELC had unsuccessfully made the same comment to the EEOC.
- **Pg. 11, § 7293.6(l):** Center likes the definition of “**mitigating measures**” which tracks the ADA regs.
- **Pg. 16, § 7293.8(g)(5):** Center asked to have the **marginal functions** of the job paragraph reinstated, finding it to be very useful. Both Commissioners Woolverton and Perez agreed, as did other public speakers, Susan Skamser and Noah Lebowitz.
- **Pg. 17, § 7293.9(a), Examples of Reasonable Accommodation:** Center thinks that the examples could be better organized and will give FEHC staff draft language showing what she means.
- **Pp. 18-19, § 7293.9(a)(3)(C), Rebuttable Presumption that Leaves Beyond Seven Months Create an Undue Hardship for an Employer:** Believes that there’s no authority for this regulation. Deciding whether a request for a leave beyond seven months as a reasonable accommodation must be determined on a case-by-case analysis.
- **P. 21, § 7293.9(b), Required Medical Information:** Center likes that we’ve added this section. She has some suggested changes, which she will send us.
- **P. 31, 7294.1(b)(6)(B):** Add “real time captioning” to the list of ways that an employer can accommodate a blind or visually impaired person.

**Susan Skamser**, ADA Coordinator for Contra Costa County, gave the following comments:

- **Pg. 7, § 7293.6(d)(9)(B): Temporary disabilities** need more examples of what is covered and what is not.
- **Pg. 7, § 7293.6(d)(9)(C): “Obesity”** does not have a clear enough definition yet, specifying when obesity *would* be considered a disability.
- **Pg. 17, § 7293.9(a)(1), Examples of Reasonable Accommodation:** Wherever the draft language says “employee,” add “applicants” and “independent contractors,” as the employer has a duty to accommodate these individuals as well.

- **Pg. 21, § 7293.9(b)(2), Required Medical Information:** Use language from EEOC, which clarifies that the employer must obtain clarification from the employee's own doctor first, before requiring the employee to go to another health care provider.

Noah Lebowitz, Esq., Duckworth, Peters, Lebowitz, LLP, gave the following comments:

- **Pg. 16, § 7293.8(g)(5), Marginal functions:** Please keep this language in, which Lebowitz finds very useful for judges and juries. Skamser, Center, Perez and Woolverton all agreed with his assessment.
- **Pp. 18-19, § 7293.9(a)(3)(C), Rebuttable Presumption that Leaves Beyond Seven Months Create an Undue Hardship for an Employer:** Agrees with Center that there's no authority for this section and thinks that it's more restrictive now than the ADA or its regulations, which, under FEHA, is not allowed. Believes that this section, reworked, properly belongs in the "undue hardship" section. Both the ADA and FEHA require individualized assessments, which is the antithesis of specific time limits. And, what causes "undue hardship" for one employer will be very different than for another.
- **Pp. 18, § 7293.9(a)(3) & (a)(5), Usage of the word "duties" rather than "functions":** Need to be consistent and use the word "functions" throughout, rather than "duties." The test is whether an employee or applicant can perform the essential functions of the job, not duties.
- **Pg. 19, § 7293.9(a)(3)(D), Holding a Job Open:** This subsection gives the wrong message and needs to be clarified to indicate that an employee has a right to reapply, because the termination was not "for cause."
- **Pg. 19, § 7293.9(a)(5)(A), Reassignment to a Vacant Position:** Add "applicants" as well as employees to the requirement of preferential consideration of reassignment to a vacant position. Because a disabled incumbent is seeking reassignment on a preferential basis (and has a right to do so, under *Jensen v. Wells Fargo Bank* and *U.S. Airways v. Barnett*) he or she is entitled to preference over both other incumbent employees and also applicants off the street.
- **Pg. 19, § 7293.9(a)(5), Jobs into the Foreseeable Future:** Add a new section which stresses that an employer has an obligation to engage with the employee in a good faith search for appropriate positions which are currently vacant or may become so in the foreseeable future, citing *Prilliman* and *Spitzer*.
- **Pg. 19, § 7294.0(d), Medical Examinations During Employment, Fitness for Duty Exams:** These are costly and confusing for employers and employees and create much litigation. Lebowitz suggests following EEOC guidance on this issue. He'll provide some suggested language.

The Commission thanked all three speakers and requested that they put their suggestions in writing and submit to staff. All three speakers agreed to this request.

Lacking a quorum, the Commission deferred action on these regulations until its next Commission meeting. The Commission directed staff to incorporate any changes it deems

necessary from the public comments received for the Commission to review at the next meeting. The Commission will adopt its draft disability regulations at the next meeting to begin the rulemaking process.

**Housing Regulations:** ELAS Noel stated that staff will have a housing regulations proposal for the Commission to consider at the next Commission meeting.

The Commission took a break at 11:38 a.m.

Commissioner Leviton arrived at 11:48 a.m.

**REVIEW OF AGENDA** (11:48 a.m.)

Chairman Woolverton unanimously called the meeting to order. [10-01] The Commission accepted the Agenda as submitted.

**REVIEW OF THE MINUTES** (11:49 a.m.)

The Commission reviewed the minutes and transactions of both the 479th Commission meeting, held September 30, 2009, and the 480th Commission meeting, held October 20, 2009. Commissioner Ng noted one correction in the 479th Commission meeting minutes, the spelling of Assembly Member Mike Eng's last name. The Commission unanimously agreed to the amendment. Commissioner Leviton moved, Commissioner Perez seconded and the Commission voted unanimously to adopt the Minutes and Transactions of the 479th Commission meeting, as amended [10-02], and the Minutes and Transactions of the 480th Commission meeting [10-03].

**DEPARTMENT'S REPORT** (11:50 a.m.)

DFEH Special Investigations Unit (SIU) Administrator Selena Wong gave the Department's report. Ms. Wong discussed the creation of DFEH's SIU, in place since July 2008. The SIU is charged with the responsibility to identify, investigate and prosecute systemic discrimination using class actions and directors' complaints. Under Government Code section 12961, issuing a directors' complaint gives the DFEH an additional year to investigate. Ms. Wong discussed four of their cases which have settled.

- The DFEH settled two large class actions involving two different employers, Star Crest and Loma Linda University Medical Center, both of whom used pre-employment tests to screen out applicants who might be prone to developing carpal tunnel syndrome. In both cases, the DFEH negotiated strong affirmative relief, as well as monetary relief.
- The DFEH also negotiated strong affirmative relief from a trucking company who were not reasonably accommodating persons with back injuries from on the job injuries.
- The DFEH negotiated a monetary and affirmative relief settlement against Plaza Court Apartments in a case involving overly restrictive rules against families with children.

The Commission thanked Ms. Wong for her report.

Chairman Woolverton moved, Commissioner Leviton seconded, and the Commission voted unanimously 4:0 to end Open Session and to enter Closed Session. [10-04]

The Commission entered Closed Session at 12:05 p.m.

### ***CLOSED SESSION***

Only the Commissioners, Commission staff, and Attorney General's staff were present.

The Commission discussed writs, hearings and litigation and deliberated on pending cases.

### **Writs and Appeals**

Deputy Attorney General Nancy Beninati and ELAS Noel reported on the status of the following cases.

(1) DFEH v. Terra Linda Farms (Santillan/Rivas)

Beninati reported that on December 29, 2009, the court denied and granted the Petition for Writ of Mandate in art. The Court affirmed the Commission's order and decision except that part awarding one of the real parties in interest, Maria Rivas, \$6,574.52. The court ordered the Commission to revise its decision to reduce that award by \$3,500, the sum that Rivas received as a settlement from her joint employer, Green Valley Ag.

Commissioner Leviton moved, Chairman Woolverton seconded and the Commission voted 3:0 to modify the decision as ordered and to designate that the damages section of the decision was non-precedential. Commissioner Perez abstained. [10-05]

Commissioner Leviton moved, Chairman Woolverton seconded and the Commission voted 4:0 not to cross-appeal costs if the Superior Court's decision is appealed by respondent. [10-06]

### **Administrative Adjudication: Pending Decisions, Hearings Completed**

(1) DFEH v. Jeannette Prichard (English)

Commissioner Leviton moved, Commissioner Ng seconded, and the Commission moved 4:0 to adopt the decision as modified. [10-07]

Commissioner Leviton moved, Chairman Woolverton seconded, and the Commission moved 4:0 to designate sections (B) and (D) as precedential. [10-08]

(2) DFEH v. BK & JG, Inc., et al (Ayala)

Chairman Woolverton moved, Commissioner Perez seconded, and the Commission moved 4:0 to adopt the proposed decision but reduce the compensatory damages award to \$15,000. [10-09]

**Renewal of Request to Suspend 60 Day Rule for Submission of Proposed Decisions (Cal. Code Regs., tit. 2, § 7433, subd. (b).)**

Commissioner Perez moved, Chairman Woolverton seconded and the Commission voted 4:0 to suspend the Commission's 60 day rule for submission of proposed decisions. [10-10]

**2010 Meeting Schedule**

The Commission set the following meeting schedule for 2010:

Tuesday, March 30  
Wednesday, June 2, 2010  
Tuesday, August 24, 2010  
Wednesday, October 20, 2010  
Wednesday, December 8, 2010

**ADJOURNMENT**

Chairman Woolverton moved, Commissioner Ng seconded, and the Commission voted 4:0 to adjourn the meeting. [10-11]

The Commission adjourned its meeting at 1:05 p.m.

Date: January 27, 2010

GEORGE WOOLVERTON  
Chairman

ANN M. NOEL  
Executive and Legal Affairs Secretary



**REPORT OF TRANSACTIONS  
OF THE 481st COMMISSION MEETING  
January 27, 2010  
San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 10-01           Unanimously called the meeting to order.
- 10-02           Adopted the Minutes and Transactions of the 479th Commission meeting, as amended.
- 10-03           Adopted the Minutes and Transactions of the 480th Commission meeting.
- 10-04           Voted to end Open Session and begin Closed Session.
- 10-05           Voted 3:0 to modify the decision in DFEH v. Terra Linda Farms (Rivas/Santillan) as ordered and to designate that the damages section of the decision was non-precedential. Commissioner Perez abstained.
- 10-06           Voted 4:0 not to cross-appeal costs in DFEH v. Terra Linda Farms (Rivas/Santillan) if the Superior Court's decision is appealed by respondent.
- 10-07           Voted 4:0 to adopt the decision in DFEH v. Jeannette Prichard (English) as modified.
- 10-08           Voted 4:0 to designate sections (B) and (D) in DFEH v. Jeannette Prichard (English) to be precedential.
- 10-09           Voted 4:0 to adopt the proposed decision in DFEH v. BK & JG, Inc., et al (Ayala) but reduce the amount of compensatory damages to \$15,000.
- 10-10           Voted 4:0 to suspend the Commission's 60 day rule for submission of proposed decisions.
- 10-11           Voted 4:0 to adjourn the meeting.

Prepared By

Ann M. Noel  
Executive and Legal Affairs Secretary